

Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DIANNE L. KELLEY and KENNETH
HANSEN,

Plaintiffs,

v.

MICROSOFT CORPORATION, a Washington
Corporation,

Defendant.

NO. C07-0475 MJP

PLAINTIFFS' RESPONSE TO
MICROSOFT'S MOTION FOR
ENTRY OF PROTECTIVE ORDER

CLASS ACTION

A. Microsoft's Proposed Protective Order is Functionally No Different Than the Proposed Order the Court Rejected as Noncompliant with CR 5(g).

We do not believe that Microsoft's proposed protective order adheres to the procedures set forth in CR 5(g) or the Court's Order Denying Motion for Protective Order entered on September 13, 2007 ("Order"). See Dkt. 42. The Court's Order holds that CR 5(g) does not permit so-called "placeholder motions" to be filed by parties, like plaintiffs, who not only have no ability to provide the "clear statement of the facts justifying a seal and overcoming the strong presumption in favor of public access" required by CR 5(g)(2), but who also may want to oppose the filing of documents under seal. See id. at 1:15-17 ("The local rules do not provide for this type of procedure, whereby a party wishing to submit documents that another party has marked

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1 “confidential” submits the documents “conditionally under seal” and shifts the burden to move
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3 for an order sealing the documents to the other party.”). It is, and should remain, the moving
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5 party’s burden to seek such an order and comply with CR 5(g) in doing so. See also Doe v.
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7 Mercer Island School Dist. No. 400, No. C06-395JLR, 2006 U.S. Dist. LEXIS 84320, at *4
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9 (W.D. Wash. Nov. 20, 2006) (“the local rules require the movant to make a ‘compelling
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11 showing’” under CR 5(g)) (emphasis added).
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13 Although Paragraph 13 of Microsoft’s proposed protective order uses different words
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15 than Paragraph 13 of the proposed order that the Court rejected, in our view, the net effect
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17 remains the same: if plaintiffs want to file a document unilaterally designated by Microsoft as
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19 “confidential,” plaintiffs—the parties with no interest in sealing and no ability to meet the
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21 requirements of CR 5(g)—would have to file a “placeholder” motion to seal that would operate
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23 to “conditionally” seal the document and shift the burden to Microsoft. This procedure does not
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25 adhere to CR 5(g), and we do not see how it differs in substance from the procedure the Court
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27 rejected in its Order. Dkt. 42. That is why we declined to sign the revised proposed protective
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29 order when Microsoft presented it to us.
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31 Similarly, Paragraph 12 of Microsoft’s proposed protective order, if entered, would
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33 require “[t]he filing party” to “file ‘CONFIDENTIAL’ material under seal in compliance with
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35 Rule 26(c)(7) and Local Rule 5(g).” Again, this would be an impossible burden for plaintiffs to
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37 satisfy when submitting documents Microsoft has deemed “confidential.” Indeed, we question
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39 whether such a motion to seal, if required to be presented by plaintiffs, would comport with Rule
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41 11. See Fed. R. Civ. P. 11(b)(2)-(3).
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B. Microsoft's Proposed Protective Order Remains Overly-Broad and Promotes the Excessive Use of the Confidentiality Designation That Rules Such as CR 5(g) Were Designed to Limit.

Plaintiffs previously signed Microsoft's prior stipulation for the now-rejected protective order in an effort to be cooperative and with the hope that it would remove a barrier to the commencement of Microsoft's document production. To be clear, however, we have had difficulty with Microsoft's concept of a protective order from the beginning of this litigation. As we told counsel for Microsoft in early August (and as we continue to maintain today):

We do not believe agreeing to be bound to a blanket protective order comports with our obligations as counsel in a putative class action seeking to obtain redress for alleged consumer protection violations. . . . We are open to considering a simpler, narrowly-tailored protective order; however, as a general operating principle, we view blanket protective orders with skepticism given the recent court decisions and the frustrations such orders create for counsel and courts in attempting to comply with them.

Dkt. 41-4 at 2.

We believe one of the purposes underlying CR 5(g) is to prevent giving effect to broad-brush designations of "confidential"—an unfortunate practice that has become all too common in modern litigation. See also Lahrichi v. Lumera Corp., No. C04-2124C, 2007 U.S. Dist. LEXIS 37208, at *2 (W.D.Wash. May 22, 2007) ("simply because documents produced or created in discovery were designated as 'confidential' during discovery does not justify sealing them from public view when filed on the Court's docket"). Microsoft has placed the "CONFIDENTIAL" designation on virtually all of the documents it has produced thus far (by our count, fewer than one percent have been produced without such designation).


C. Conclusion

We will do whatever the Court wants us to do on this issue. We believe, however, that plaintiffs have legitimate concerns regarding the proposed protective order presented by


1 Microsoft. Our concerns include the following: (a) we need discovery unfettered by Microsoft's
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3 expansive view of confidentiality; (b) if the civil rules are not adequate protection for Microsoft,
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5 we need clear and reasonable procedures to follow when filing documents unilaterally marked
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7 "confidential" by Microsoft; (c) we do not want to have to make motions to seal that we cannot
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9 and do not support; (d) confidentiality designations, as a general matter, should be limited; and
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11 (e) and it should always remain the burden of Microsoft, not plaintiffs, to seek orders sealing
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13 those documents Microsoft designates as "confidential."
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15 DATED this 19th day of September, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following.

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